PD-1348-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 5/13/2018 11:40 AM
Accepted 5/14/2018 9:45 AM
DEANA WILLIAMSON
CLERK

NO. PD-1348-17

FILED
COURT OF CRIMINAL APPEALS
5/14/2018
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

LAURO EDUARDO RUIZ,	§	**COURT OF APPEALS**
	§	**IN THE FOURTH**
v.	§	**JUDICIAL DISTRICT**
	§	**SAN ANTONIO, TEXAS**
STATE OF TEXAS	§	**No. 04-16-00226-CR**

APPELLEE'S BRIEF ON THE MERITS

ON APPEAL FROM THE 186TH JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 2015CR4068

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***Oral Argument Permitted**

IDENTITY OF PARTIES AND COUNSEL

The parties to this litigation are as follows:

1) **Lauro Eduardo Ruiz**, petitioner herein was the defendant in the trial court;

2) **Travis Baskin**, trial attorney for petitioner; **Shawn C. Brown** and **Adrian Flores**, trial and appellate attorneys for petitioner; **Alex J. Scharff** Appellate Attorney for petitioner.

3) **S. Patrick Ballantyne**, trial attorney for the **State of Texas**; **Lauren A. Scott**, trial and appellate attorney for the **Bexar County District Attorney's Office, Nicholas LaHood, District Attorney**;

4) The trial judge was **The Honorable Andrew Carruthers**, as referred by **The Honorable Jefferson Moore** of the 186^{h} Judicial District Court of Bexar County, Texas.

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RECORD REFERENCES

In this brief the Clerk's record will be as follows: (CR-page); references to the court reporter's statement of facts will be cited as follows: (RR-page). Should there be multiple volumes, the volume number will cited–e.g. [fourth volume] as (4RR-page). Trial exhibits will be cited to the volume number and to the number of the exhibit, e.g. (3RR-SX 34)

WORD COUNT CERTIFICATION OF COMPLIANCE

This is to certify that the foregoing Appellee's Brief on the Merits, save and except all portions expressly excluded from the final word count pursuant to Tex. R. App. P. 9.4(i)(1), contains 5,319 words and is thus in compliance with Tex. R. App. P. 9.4(i)(2)(D).

STATEMENT REGARDING ORAL ARGUMENT

The Honorable Court has permitted Oral Argument in this case.

STATEMENT OF CASE

The State of Texas indicted Lauro Eduardo Ruiz, with ten counts of attempted production of sexual performance by a child on April 13, 2015. (C.R. at 3-6). On December 31, 2015, Mr. Ruiz filed a motion to suppress evidence arguing that all photographs and digital files had been illegally obtained when his cell phone was seized from his possession, and when its contents were searched, both without his consent. (C.R. at 7-22).

On March 9, 2016 the Court heard testimony and evidence in a pretrial hearing on Appellee's motion, and, after hearing arguments on April 7, 2016 granted the motion to suppress evidence, made oral findings on the record, and signed the evidence suppression order. (C.R. at 35, Supp. C.R.3-4, and 2 R.R. at 24-25.). On April 8, 2016, the State filed a notice of appeal and request for stay of trial court proceedings. (C.R. at 31-33.). The Fourth Court of Appeals issued its memorandum opinion reversing the ruling of the trial court on July 26, 2017. *State v. Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928. Petitioner filed a Motion for *En Banc* Reconsideration on August 9, 2017. The Fourth Court of Appeals denied the Petitioner's motion by virtue of its ruling on November 16, 2017. This timely petition and appeal follows.

ISSUES PRESENTED

1. The Court of Appeals misapplies the standard of review when examining article 38.23 of the Texas Code of Criminal Procedure.
2. As Petitioner was the prevailing party at the Motion to Suppress, the court of appeals should have deferred to the trial court and presume it also found an additional violation of law sufficient to trigger the Texas Exclusionary Rule as such findings are supported by the record.

STATEMENT OF FACTS

Lauro Eduardo Ruiz was a substitute teacher and part-time athletics coach at Antonian High School in San Antonio, Texas. (1 R.R. at 10). On February 26, 2014, Antonian Vice Principal Steven Hayward sent Mr. Ruiz a text message asking Mr. Ruiz to come by his office. (1 R.R. at 11, C.R. at 17). Mr. Ruiz arrived quickly and was told to accompany the Dean of Students, Laura Rodriguez, into the principal's office. (1 R.R. at 12, C.R. at 17). While they sat and waited for the principal, Mr. Ruiz briefly tried to check his phone but Dean Rodriguez instructed him to stop using his phone. (C.R. at 14). Mr. Ruiz placed his phone into his pocket and waited in silence for ten more minutes. (1 R.R. at 52, C.R. at 14).

Vice Principal Hayward then arrived and, together, he and Dean Rodriguez informed Mr. Ruiz that there had been complaints about his behavior and asked him whether there was anything they should know about. (1 R.R. at 15-16, 54-55, C.R. at 14, 17). When Mr. Ruiz told them "no," the administrators informed him that some students had accused Mr. Ruiz of taking inappropriate photos of them in the classroom and asked to see his phone. (1 R.R. at 13, 16, 55). Mr. Ruiz did not respond to the allegations but did state he had some pictures of his girlfriend he did not wish them to see and he refused to allow the administrators to have his phone. (1 R.R. at 16-18, 55-57). Vice Principal Hayward and Dean Rodriguez once more asked to see his phone, and Mr. Ruiz again refused. (1 R.R at 18, 55-59, C.R. at 14,

17). The administrators informed Mr. Ruiz that they would involve the police if he continued to refuse but Mr. Ruiz still refused anyone consent to take his phone. (C.R. at 14).

They then instructed Mr. Ruiz to place his phone on the desk in front of him. (1 R.R. at 19, 58-59). Mr. Ruiz was sitting closest to the desk with the two administrators sitting around him so he placed his phone immediately in front of him on the desk. (1 R.R at 19, 54, 59, 89-91). Antonian High School Principal Gilbert Saenz then arrived and the three administrators sat around Mr. Ruiz in the office. (1 R.R. at 89-91). Principal Saenz asked Mr. Ruiz whether he had an ongoing relationship with any students and whether he was texting or communicating with students. (1 R.R. at 61). Mr. Ruiz stated that he was not texting any students and that he had no improper relationships with any of them. (1 R.R. at 61, C.R. at 17).

Principal Saenz then swiped Mr. Ruiz's phone from the table, without his consent, and began to go through the pictures, without his consent. (1 R.R. at 18-20, 61-63, 95, 98-99, 3 R.R. at 23 [Defendant's Exhibit 2]). After viewing several pictures and videos in Mr. Ruiz's phone, Principal Saenz informed him that he could not have his phone back and that he was being suspended. (1 R.R. at 61-63, 97-99, 3 R.R. at 23 [Defendant's Exhibit 2]). Principal Saenz held Mr. Ruiz's phone while Mr. Ruiz copied necessary numbers, and then placed the phone in a

manila envelope. (1 R.R. at 20-21, 63-65, 3 R.R. at 23 [Defendant's Exhibit 2], C.R. at 14-15). Mr. Ruiz did not once attempt to reach over the desk and try to forcibly take back his phone once Principal Saenz had it in his custody. (1 R.R. at 21, 39, 66-67, 105-6).

Vice Principal Hayward then escorted Mr. Ruiz off the Antonian High School campus. (1 R.R. at 37-38). Mr. Ruiz did not consent to allow anyone to take his phone and enter its contents, and none of the Antonian High School administrators had a search warrant permitting them to enter the contents of Mr. Ruiz's phone. (1 R.R. at 16-20, 22, 55-56, 96, 99, 103-4, C.R. at 15). Principal Saenz turned over Mr. Ruiz's cell phone to the Castle Hills Police Department and that very next day of February 27, 2014, sent them an email stating:

> My name is Gilbert Saenz, Principal of Antonian College Preparatory High School, 6425 West Ave, San Antonio, Texas 78213 relevant to case # 2014-02-0048.
>
> I was called to my office by Mr. Steve Hayward, Assistant Principal. When I arrived, Mrs. Laura Rodriguez, Dean of Students, was present as was Larry Ruiz, part-time football/track coach and substitute. They informed me that there was a problem. I asked Mr. Ruiz what the problem was and he had a hard time speaking. At some juncture, he told me that he had a problem. I continued to prompt him to tell me about the problem. He could not. At some point after prodding him, he said he had a problem and admitted to videoing students undergarments in the classroom.
>
> I told him that I was suspending him and that he needed to turn in his keys. When it came to his phone, which was on my desk when I walked in, I told him that I was not able to give his phone back to him as I needed to turn it in to the police. I pressed the pictures app on the

> phone and scrolled through them. I saw what seemed to be twenty or so videos of the legs and uniform of our students.
>
> He asked if he could get some numbers off of it. I allowed him to write some numbers down. The phone remained on my desk at all times. In his presence, I placed the phone in a manilla (sic) envelop. (sic) I did not open it or look at the phone thereafter. After consulting with our attorney and archdiocese officials, I called the Castle Hills Police at around 4:00 PM to report the incident. I turned over the envelop (sic) with his phone over to Officer Wayne Wagner.

(3 R.R. at 23[Defendant's Exhibit 2]).

Subsequently, Castle Hills PD Sergeant Detective Paul Turner typed up an affidavit for a search warrant of Ruiz's cell phone, stating specifically that "...17. The school Principle (sic) began to look through Lauro Ruiz's phone and he observed numerous images and videos of the students 'undercarriage.' Images and video consistent with what the two aforementioned witnesses saw." (CR-21) Magistrate Michael Ramos issued the search warrant based on Turner's affidavit. (CR-19). Police Sergeant Wayne Waggoner later testified that he would not have been able to search Mr. Ruiz' phone without a warrant and that such an act would be a violation of Mr. Ruiz' rights. (1 R.R. at 126).

After hearing all the witnesses testify and all the arguments of counsel, the trial court made the following ruling:

> Okay. I will grant the Motion to Suppress. I find that the information obtained from the cell phone was a result of a private citizen seizing the defendant's telephone. Though the defendant may or may not have consented to leaving his cell phone with school authorities, he did not consent to the search.

> Gilbert Saenz, the witness who testified in this matter as the ex-principal of the school at which the defendant was employed, conducted a search of the defendant's telephone without obtaining a search warrant. He subsequently gave the information he had obtained from the search of the defendant's cell phone to law enforcement authorities. That resulted in that information being fruit of the poisonous tree since the initial examination of the contents of the defendant's cell phone was without a warrant, was without the defendant's consent or permission.
>
> Subsequently, a search warrant was obtained by police officers. And information was obtained from the defendant's cell phone through the search warrant. However, that information was originally derived from Gilbert Saenz's examination of the defendant's cell phone without a warrant, without the defendant's consent, without exigent circumstances which justified a warrantless search. Therefore, I conclude that all of the information obtained from the defendant's cell phone is inadmissible against the defendant in his trial. We stand in recess on that matter.

(2 R.R.-24-25).

SUMMARY OF THE ARGUMENT

The Fourth Court of Appeals' ruling in Mr. Ruiz case was incorrect as it ignores the rule pronounced by this Court in *Miles v. State*, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007). The relevant inquiry is not whether a private citizen can violate the Fourth Amendment, but whether the private citizen's actions, if they'd been effectuated by a police officer or government agent, would have violated the Fourth Amendment. The Trial Court correctly found that the school principal's actions, through the application of this rule, constituted an illegal search with no valid warrant exception. This finding is supported by the record. The record also supports the finding that the school principal also committed the additional violation of Texas Penal Code 33.02 Breach of Computer Security when he searched through the Contents of Mr. Ruiz' cell phone without his permission. As the trial court's ruling was correct under this theory of law, and not unreasonable, arbitrary, or outside the zone of reasonable disagreement the appellate court erred when reversing the Trial Court's granting of the Motion to Suppress. The Trial Court properly applied article 38.23 of the Texas Code of Criminal Procedure.

ARGUMENT

THE FOURTH COURT OF APPEALS MAJORITY OPINION MISAPPLIES THE STANDARD OF REVIEW WHEN EXAMINING ARTICLE 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

1. A police officer in Principal Saenz' shoes could not have legally searched Mr. Ruiz' phone, therefore Principal Saenz could not have legally searched Mr. Ruiz' phone.

The Fourth Court of Appeals' majority opinion, written by the Honorable Justice Alvarez, joined by the Honorable Justice Chapa, misapplied the standard of review when examining Tex. Code Crim. Proc. Art. 38.23(a),

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." (Vernon 2017).

The trial court found after hearing the Motion to Suppress, to which the State agreed on appeal, that "the pertinent facts are not in dispute --- the school administrator, Mr. Saenz, picked up Ruiz's phone, scrolled briefly through the [cell]phone, [by pushing the Pictures cellphone 'App' and looking at the pictures]

and turned the phone over to the police." (bracketed language added to reflect testimony from the suppression hearing). *State v. Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 18 (Tex. App.—San Antonio, July 26, 2017) (per curiam) (Martinez, R., dissenting). The trial court, Honorable Andrew Carruthers, issued findings of fact and conclusions of law specifically finding that Mr. Ruiz' phone had been illegally searched without a warrant, without consent, without exigent circumstances or any otherwise valid warrant exception. (2RR-24-25).

The crux of Ruiz' complaint is the failure by the Fourth Court of Appeals to follow the reasoning in *Miles v. State* in which this Honorable Court exhaustively examined the legislative history, purpose, and meaning of "an officer or other person" as plainly set out in Tex. Code Crim. Proc. Art. 38.23(a), and where the court held "...**that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do**..." Miles v. State, 241 S.W.3d 28, 39 (Tex. Crim. App. 2007) (emphasis added). The Fourth Court of Appeals in *Ruiz* did not rely on *Miles* for analysis but stated, "Simply put, if no violation of the law occurred, article 38.23(a) has no application in this case." *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 7.

However, as the Fourth Court of Appeals itself previously recognized in *Melendez v. State*, 467 S.W.3d 586 (Tex. App.—San Antonio 2015, no pet.), the "Texas exclusionary rule is broader than the federal exclusionary rule that applies

only to governmental actors, not private individuals." *Id*. at 592. Indeed, "The Texas exclusionary rule applies to illegal searches or seizures conducted by law enforcement officers or 'other persons,' even when those other persons are not acting in conjunction with, or at the request of, government officials." *Miles* at 36. Importantly, "[o]nly those acts which violate a person's privacy rights or property interests are subject to the state . . . exclusionary rule." *Id*. At 36 n. 33 (citing *Chavez v. State*, 9 S.W. 3d 817, 822-23 (Tex. Crim. App. 2000) (Price, J. concurring)). Additionally, in *Pitonyak v. State*, the Austin Court of Appeals reiterated the Court of Criminal Appeals holding in *Miles*, but added that "**although the Fourth Amendment warrant requirement applies only to police officers and other agents of the government as a matter of constitutional law, *Miles* effectively applies the Fourth Amendment warrant requirement–and the exceptions to that requirement–to the conduct of private persons.**" *Pitonyak v. State*, 253 S.W.3d 834, 850 (Tex. App.–Austin, 2008, pet. ref'd, rehearing overruled) (Emphasis added). Finally, as the *Miles* Court stated:

> "if an officer violates a person's privacy rights by his illegal conduct making the fruits of his search or seizure inadmissible in a criminal proceeding under Article 38.23, that same illegal conduct undertaken by an "other person" is also subject to the Texas exclusionary rule. If police cannot search or seize, then neither can the private citizen."

Miles at 36.

The proper query, thus, is not whether Principal Saenz, a private individual, can violate the Fourth Amendment, but whether Principal Saenz' actions if effectuated by a police officer would have violated the Fourth Amendment. If so, then the Texas Exclusionary Rule is properly invoked, applied, and all evidence seized pursuant to those actions must be suppressed. The plain language of Tex. Code Crim. Proc. Art. 38.23 allows for the exclusion of evidence by law enforcement or "other persons" if obtained in violation of any Texas or Federal Constitutions. Moreover, the United States Supreme Court has held that "...a warrant is generally required before... a search [of the information on a cell phone] even when a cell phone is seized incident to arrest*." Riley v. California*, 573 U.S. 1161, 134 S. Ct. 2473, 2493 (2014). The Court recognized the unique characteristics of modern cell phones as different "in both a quantitative and a qualitative sense" from other objects, acknowledging that they "implicate privacy concerns far beyond . . . the search of . . . a wallet, or a purse." *Id*. at 2488-89. The Court also noted that modern cell phones are "in fact minicomputers" with an immense storage capacity, containing many distinct types of information such as photos, addresses, bank information, internet search history, etc. that amount to the "sum of an individual's private life." *Id*. at 2489. Indeed, as the Supreme Court found, a "cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id*. at 2491. The Court did not

foreclose the search of a cell phone without a warrant if a generally accepted exception to the warrant requirement was proven. *Riley* at 2494.

Using these authorities and the *Miles* rule as guidance, absent a warrant, consent, or exigent circumstances, a police officer standing in the shoes of school principal, Mr. Saenz, could not have picked up and searched through Ruiz' cell phone after it was secured on top of the desk under the supervision of two administrators; when private citizen Principal Saenz seized Mr. Ruiz's cell phone and then started looking through it without a warrant, consent, or exigent circumstances – as the trial court undeniably found – Saenz' actions violated the Fourth Amendment, as an officer standing in Principal Saenz's shoes *could not* have legitimately seized Mr. Ruiz's phone and examined its contents. As the Honorable Rebeca Martinez recognized in her dissent: "Ruiz had a legitimate expectation of privacy in the contents of his cell phone, and it is just such interest that the Texas exclusionary rule protects." *Ruiz* at 20. In fact it was just such an interest that inspired the initial implementation of article 38.23:

> In applying this exclusionary rule, we stated that "[t]he manifest purpose" of [the exclusionary rule] "was to reverse the rule applied by this court in the *Welchek* case[.]" The Legislature thus "sanctioned the construction by the Federal courts of the search-and-seizure clause of the [federal] Constitution." But if the legislative purpose of [the article implementing the exclusionary rule] was to enact a Texas exclusionary rule just like the federal rule, why did the statute bar evidence illegally obtained by any "other person" as well as by law enforcement officers? Surely the 1925 Legislature knew that, in 1921,

> the Supreme Court had explicitly held that the federal exclusionary rule applied only to government actors, not private individuals.

Miles at 34-35 (recognizing that the Texas Legislature enacted an exclusionary rule broader than its federal counterpart precisely because of the *Welchek* scenario and the "widespread problem of vigilante-type private citizens [acting] in concert with the police conducting illegal ***searches*** for whiskey.")[1]

The school administrator Saenz searched Ruiz's cell phone without a search warrant or any showing of an exception to the warrant requirement, specifically by consent or showing of exigent circumstances. A police officer or government agent undertaking these actions would have undoubtedly violated the Fourth Amendment. The Trial Judge correctly found this to be an illegal search and properly applied Article 38.23.

2. The Fourth Court of Appeals has previously applied constitutional violation analysis to private individuals under 38.23 of the Texas Code of Criminal Procedure, which precedent has been cited by other courts of appeals creating conflict between jurisdictions.

In its opinion, the Fourth Court of Appeals discusses the Fourth Amendment and Article I, section 9 of the Texas Constitution, finding that they apply only to

[1] *Welcheck v. State*, 93 Tex.Crim. 271, 247 S.W. 524 (1922) involved a sheriff working in conjunction with private persons who stopped and seized jugs of whiskey from a bootlegger without a warrant. *Id*. at 274, 247 S.W. at 526. The Court refused to read an implicit or explicit exclusionary rule in the Texas Constitution. *Miles* recognizes that the legislature enacted what would become 38.23 to specifically overturn the reasoning and ruling in *Welcheck*. *See Miles* at 33.

searches and seizures by agents of the Government and not to the actions of private individuals. *See Ruiz* at 6 (citing many State and Federal cases that predate the current iteration of the Texas Exclusionary Rule as expounded in 2007 by the Court of Criminal Appeals in *Miles*). The Fourth Court of Appeals held that "because Saenz is a private individual, his alleged search of the cell phone under either the Fourth Amendment or the Texas Constitution cannot substantiate the violation of law required under article 38.23." *Ruiz* at 8.

However as we've already discussed, the Fourth Court of Appeals previously recognized in *Melendez*, 467 S.W.3d 586 that the "Texas exclusionary rule is broader than the federal exclusionary rule that applies only to governmental actors, not private individuals" and that the Texas exclusionary rule "applies to illegal searches or seizures conducted by 'other persons' even when those other persons are not acting in conjunction with, or at the request of government officials." *See id*. at 592 (citing the *Miles* doctrine). In *Melendez*, the Court applied a constitutionally-based reasonable suspicion analysis to the conduct of a private (not off-duty police officer or certified peace officer) security guard in determining whether there was an illegal seizure. *See id*. at 592–93. The Fourth Court of Appeals walked us through a survey of Fourth Amendment jurisprudence and identified a litany of factors that ultimately provided this private citizen sufficient indicia of suspicion to justify a temporary investigative detention. *See id*. The

appellate court essentially conducted a *Terry* analysis to the conduct of a private citizen where the only violation alleged was the right to be free from unreasonable searches or seizures. As the Honorable Chief Justice Sandee Bryan Marion recognized in *Melendez*: "a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do." *See id*. (quoting *Miles*). The Fourth Court of Appeals' ruling in Mr. Ruiz' case stands in contrast to this previous decision by the same appeals court.

Furthermore, the ruling in the present case has now created a rift among the other courts of appeals who have relied upon the *Melendez* ruling in applying section 38.23 to the conduct of private citizens. *Mancia v. State*, No. 13-16-00401-CR, 2017 Tex. App. LEXIS 7949 (Tex. App.—Corpus Christi Aug. 17, 2017); *Denkowski v. State*, No. 14-16-00273-CR, 2017 Tex. App. LEXIS 7815 (App.—Houston [14th Dist.] Aug. 17, 2017). In *Mancia*, the Thirteenth Court of Appeals applied a Fourth Amendment seizure inquiry to the conduct of a private citizen in a DWI investigation. *Mancia*, No. 13-16-00401-CR, 2017 Tex. App. LEXIS 7949 at 3–10. In *Denkowski*, the Fourteenth Court of Appeals employed a similar constitutional framework when analyzing whether to apply the exclusionary rule when a private citizen detained a suspected drunk driver. *Denkowski*, No. 14-16-00273-CR, 2017 Tex. App. LEXIS 7815 at 11–17.

3. The cases cited by the Fourth Court of Appeals are all reconciled using the *Miles* doctrine.

The Majority opinion relies heavily on *Stone v. State*, 574 S.W.2d 85 (Tex.Crim.App. 1978) and to a lesser extent *Kane v. State*, 458 S.W.3d 180 (Tex. App.–San Antonio, 2015, pet. ref'd), and *Baird v. State*, 398 S.W.3d 220 (Tex.Crim.App. 2013).

Stone involved a babysitter who had been hired to care for the Stone children at the Stone residence and who, undoubtedly, had express consent to be at the Stone residence whenever she discovered photographs depicting illicit sexual activity. *Stone*, 574 S.W.2d at 87. The Court ruled that the babysitter's conduct was not unlawful and that exclusion of evidence was not required. *See id*. at 88-89 A police officer or government agent in the babysitter's position, with express invitation and consent to be at the Stone residence, would have also been lawfully present and, thus, not committing *any* illegality when she discovered the photographs and seized them as criminal evidence: exclusion would not be required.[2]

[2] Indeed this Court previously reconciled the *Stone* ruling with its reasoning in *Miles,* ruling that:

> if a law enforcement officer had been standing in the shoes of the babysitter who was legitimately in the bedroom, he could have seized these photographs if they were in plain view and clearly depicted sexual assault of a child. Had the search and seizure been made by an officer, the fruits of a "plain view" seizure would not be excluded under Article 38.23(a). Thus, the fruits of the babysitter's seizure would not be excluded under the rule.

Miles at 37-38.

Similarly, *Kane* involved a private person searching a thumb drive that was effectively abandoned at a university to determine the owner,[3] and *Baird* involved the perusing of a personal computer by a person who was paid to watch the house and who had consent to access the computer. In both cases, the motion to suppress was denied and the denials were upheld on direct appeal. Moreover, had a police officer been similarly situated to the University Administrator searching the lost thumb drive to determine the owner as in *Kane*, or to the dog sitter accessing the computer to which she had been given consent as in *Baird*, there would also be no illegality and thus no application of 38.23.[4]

The Majority opinion also makes much note of the maxim that "a private citizen taking possession of evidence – solely with the intent to provide the evidence to police officers for purposes of a criminal investigation does not implicate article 38.23(a)." *See Ruiz* at 9. This incantation is misplaced for several reasons.

First, it assumes that the "taking" of "possession" has been accomplished through lawful means, or that the person who "takes" is lawfully situated at the

[3] The *Kane* case, interestingly, turns on the fact that the appellant was unable to establish a legitimate and reasonable expectation of privacy over the contents of the flash drive. *See Kane* 458 S.W.3d. The Fourth Court of Appeals conducts this Fourth Amendment privacy inquiry to the conduct of the acknowledged private persons who later searched the flash drive, again engaging in constitutional analysis to the conduct of private persons under the framework of 38.23. *See id*.

[4] In *Kane* this is so because there is no "search" – and, thus, no implication of the Fourth Amendment – where there is no expectation of privacy. *See Katz v. United States*, 389 U.S. 347 (1967).

moment of "taking." Second, it discounts the very reason that article 38.23 was initially implemented: to prevent private citizens from illegally seizing, searching and acquiring evidence to then hand it over to the government.

> Long before national Prohibition laws were enacted, Texas had created its own local-option liquor and prohibition laws. Enforcement of these local-option laws led to the formation of various citizen groups, including the "Law and Order League," whose members pledged to aid officers to enforce the laws, especially local-option laws, and to "`clean up' their town and county of crime[.]"Presumably, the Legislature foresaw that, if the exclusionary rule applied only to government officials or their agents, these "Law and Order League" members might well continue their illegal search-and-seizure operations without the participation or supervision of police officers. Then these vigilante members would hand over the illegally seized evidence, on a "silver platter," to government officers for use in criminal trials. **To avoid the prospect of implicitly encouraging or condoning vigilante action by these citizen groups, the Legislature applied its statutory exclusionary rule to both law-enforcement officers and private persons**.

Miles at 35 (emphasis added).

Finally, the mere "taking possession" is not Ruiz' only or chief complaint. Ruiz placed his personal cell phone on the table in front of him and then Principal Saenz, without asking, grabbed the phone and subsequently searched through the highly personal contents of his phone without consent. It is the "taking" of the phone that was illegal, but also the going into, accessing, and searching the contents of his phone: Ruiz had a well-settled, established, and legitimate expectation of privacy in the contents of his phone. Even outside the legal ambit, it is a well-recognized tenet of etiquette and social norm that to search someone's

phone without consent is an invasive and offensive act; a cursory survey of current popular television, music, articles, and blogs reveals a multitude of narratives dealing with the fissures and fallout of such an act.[5]

The trial court expressly found that Mr. Ruiz did not give consent to the search of his cell phone and the record supports that finding. *See* (2RR-24-25). As Justice Martinez recognizes in her dissent: "By scrolling through the images on Ruiz' cell phone, Saenz did what a police officer in the same shoes could not have legally done without a warrant or an exception to the warrant requirement." *See Ruiz* at 22. Principal Saenz was not legally situated by the act of accessing Mr. Ruiz' phone and going into the contents therein.

[5] *See e.g.* Kelly Wallace, Is it Ever OK to Snoop on Your Partner, (May 26, 2015, 6:26 AM), https://www.cnn.com/2015/05/26/living/feat-ok-to-snoop-on-partner-texts-emails/index.html (discussing a study that examined the issues created by people accessing the phones of others); Lee Coan, Is it Ever OK to Look at Your Partner's Phone, (May 6, 2014, 8:21 AM), https://www.telegraph.co.uk/men/thinking-man/10793926/Is-it-ever-OK-to-look-at-your-partners-phone.html (discussing problems created by people accessing the contents of others' phones); *Cobra Kai* (YouTube Red broadcast 2018) (in this acclaimed reboot and sequel series to the 1984 Cult Classic *The Karate Kid*, our now adult hero Daniel Larusso sets off a dramatic narrative arc when he accesses a text conversation between his teenaged daughter and her boyfriend).

AS PETITIONER WAS THE PREVAILING PARTY AT THE MOTION TO SUPPRESS, THE COURT OF APPEALS SHOULD HAVE DEFERRED TO THE TRIAL COURT AND PRESUME IT ALSO FOUND AN ADDITIONAL VIOLATION OF LAW SUFFICIENT TO TRIGGER THE TEXAS EXCLUSIONARY RULE AS SUCH FINDINGS ARE SUPPORTED BY THE RECORD.

The majority in the Fourth Court of Appeals also held, "…the record does not support that Saenz violated any state or federal law that would require suppression in this case." *Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 11. However, in addition to the findings delineated under the first issue of this brief, the record also supports the additional finding that Saenz violated Texas Penal Code 33.02 Breach of Computer Security, which provides,

> (a) A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

It is uncontradicted that Ruiz did not consent to Saenz' search of Ruiz' cellphone, thus Saenz broke the law when he knowingly accessed Ruiz' cellphone without Ruiz' consent. While it is a defense to the prosecution "that the person acted with the intent to facilitate a lawful seizure or search of, or lawful access to, a computer, computer network, or computer system for a legitimate law enforcement

purpose" under section (e) of 33.02, that finding was not made by the trial court in the Findings of Fact or Conclusions of Law.

Thus, the appellate court also misapplied the correct standard of review of a trial judge's granting of a Motion to Suppress cited in the opinion at page 4:

> "This court must "uphold the trial court's ruling on appellant's motion to suppress if that ruling was supported by the record and was correct under any theory of law applicable to the case." *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003) (citing *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000)). We will reverse the trial court's suppression decision if it is unsupported by the record, "arbitrary, unreasonable, or 'outside the zone of reasonable disagreement.'" *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). "

Ruiz, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 6.

Because the trial court's ruling granting Ruiz' Motion to Suppress was not unsupported by the record, arbitrary, unreasonable, or "outside the zone of reasonable disagreement," the appellate court erred when reversing the trial court's granting of the Motion to Suppress. The appellate court's dissenting opinion by the Honorable Justice Rebeca C. Martinez correctly applied the standard of review in relying on the clear rule set out by *Miles,* "...that a private person can do what a police officer standing in his shoes can legitimately do, but cannot do what a police officer cannot do..." because law enforcement needed a warrant to search Ruiz' phone, Saenz "warrant-less" intrusion was illegal but also a violation of Texas Penal Code 33.02 Breach of Computer Security. *See Ruiz*, No. 04-16-00226-CR, 2017 Tex. App. LEXIS 6928 at 20.

II. CONCLUSION

The trial court's granting of Ruiz's Motion to Suppress Evidence was correctly based on the law and his findings regarding the facts surrounding the illegal search of Ruiz's phone were clearly based on the evidence adduced at the hearing. Because the appellate court's opinion misapplied the standard of review and rationales set out in *State v. Dixon, Miles v. State, Pitonyak v. State,* and the Fourth Court of Appeals own *Melendez v. State,* and *Kane v. State*, this court should reverse the Fourth Court of Appeals' opinion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Ruiz respectfully prays that the opinion of the Fourth Court of Appeals in *State v. Ruiz*, No. 04-16-00226-CR be reversed and that the ruling of the 186th District Court be affirmed and reinstated. Ruiz prays for all further relief that this Honorable Court of Criminal Appeals should deem him entitled, be they in law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the following Brief for Appellant was delivered to the Bexar County District Attorney's via E-file on this 13th day of May, 2018.

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ALEX J. SCHARFF